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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 939.

J. L. STERN,
Petitioner,

vs.

JOHN I. COX.
Respondent.

petition not granted

OBJECTIONS

To Petition for Writ of Certiorari

and

BRIEF

In Support of Objections to Granting Writ.

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INDEX.

Page

Objections of respondent John I. Cox to jurisdiction to grant writ 1

Brief of John I. Cox, respondent, in support of objections and in reply to brief filed by petitioner in support of petition for writ of certiorari..... 3

Summary and statement of the matter involved.. 3

Respondent's objections to jurisdiction..... 8

Appendix 13

Exhibit "A." Opinion of Court of Appeals of Tennessee in case of John I. Cox vs. J. L. Stern..... 13

Exhibit "B." Order of Supreme Court of Tennessee denying petition for certiorari in above case.... 30

Cases Cited.

Copperwell Steel Co. v. Industrial Commission of Ohio, 324 U. S. 780, 89 L. ed. 1363..... 11

Herb v. Pitcairn, 324 U. S. 117, 89 L. ed. 289..... 11

Richardson Machine Co. v. Scott, 276 U. S. 128, 72 L. ed. 497 10

Williams v. Keiser, 323 U. S. 471, 89 L. ed. 398-403... 10

Statutes Cited.

Act of Feb. 13, 1925, Sec. 8 (28 U. S. C. A., Sec. 350).. 1, 8

Rule 32, 173 Tenn. 886 9

Rule 38 of Supreme Court of United States..... 8, 9

United States Constitution, Sec. 2 of Art. IV.....3, 10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 939.

J. L. STERN,
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vs.

JOHN I. COX.
Respondent.

OBJECTIONS OF RESPONDENT JOHN I. COX TO JURISDICTION TO GRANT WRIT.

Respondent John I. Cox in the above styled case respectfully objects to the jurisdiction of the Court to grant a writ of certiorari, asserted by the petitioner, for the following reasons:

1. The petition for review on writ of certiorari of the decision of the Court of Appeals of Tennessee, Eastern Section, is not accompanied by a certified transcript of the record in the case, including the proceedings in that Court to which the writ is asked to be directed, and the proceedings in the Supreme Court of Tennessee.

2. The petition, the record and the supporting brief were not filed with the Clerk of this Court within the period prescribed by Section 8 of the Act of February 13, 1925 (28 U. S. C. A., Sec. 350), namely, three months after the entry of the judgment or decree of the Supreme Court of Tennessee denying petitioner's application to that Court for a writ of certiorari to be directed to said Tennessee Court of Appeals.

3. A copy of the printed record has not been served by the petitioner on counsel for respondent.

4. The petition for certiorari does not contain an adequate statement of the matter involved, nor the questions presented by the record, had the same been timely filed.

5. The statement of facts presented in the petition does not show that the nature of the case and the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied upon for the writ of certiorari.

6. No real or substantial federal question is presented for the consideration of the Court.

7. No substantial federal question is involved.

8. The determination of the case did not require the determination of any federal question.

9. The State Court properly rested its grounds of decision on non-federal questions.

10. The alleged federal questions are frivolous.

11. The petition, certainly the record, discloses that the questions presented are all questions of local law.

12. The petition does not show merit.

Wherefore, the respondent respectfully prays that the petition for a writ of certiorari be denied.

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BRIEF OF JOHN I. COX, RESPONDENT,
In Support of Objections to Granting Writ of Certiorari and in Reply to Brief Filed by Petitioner in Support of Petition for Writ of Certiorari.

May It Please the Honorable Court:

I.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

It is most difficult, if not impossible, to summarize or state the matter involved in the case without a record, and the Court will know from the notice served upon counsel for respondent that no record has been served or furnished such counsel, and respondent's information is that no record or certified transcript of the record has been filed in the Clerk's office.

It is equally difficult to recognize the case from the statement thereof in the Petition. The facts leading up to the institution of petitioner's suit against respondent in the Corporation Court of Bristol, Virginia, which are most material as respondent verily believes, are omitted, and, apparently, petitioner would have the Honorable Court believe that the only question involved is whether or not petitioner, under Section 2 of Article IV of the Federal Constitution, had the right to sue respondent in said Corporation Court or wherever else he could obtain jurisdiction of either the person or property of the respondent, for the purpose of collecting attorney fees which he claims respondent owes him (Petition, pp. 2-8).

But this is not the case at all, as the Court will observe if and when it has an opportunity to look at the record. Petitioner had, shortly prior to the institution of his suit

in the Virginia Court, brought a similar suit against respondent for the same fees in the Law Court of Bristol, Tennessee, in which he only claimed $2150.00. This suit in the Tennessee State Court of the same twin city in which the Virginia suit was instituted was dismissed upon petitioner's motion for a voluntary non suit when the Tennessee Court continued the trial of the case on account of respondent's illness which prevented him going to trial on January 4, 1944, following the institution of the suit on November 13, 1943, which followed a settlement of these fees at the sum of $650.00 made by the parties on July 22, 1943, of which amount $300.00 had been paid by the respondent and more than the balance had been assigned to third parties by petitioner, all prior to the time respondent instituted his $2150.00 suit in the Law Court at Bristol, Tennessee. Respondent later paid the assignments.

Petitioner's suit in the Corporation Court was for $5000.00. He later filed a bill of particulars in that court claiming $6292.00, and later filed an amended bill of particulars claiming $8000.00.

The suit in the instant case was instituted by respondent in the Chancery Court at Bristol, Tennessee, to enjoin the prosecution of petitioner's suit in the Corporation Court of Bristol, Virginia, upon the ground that petitioner

> ". . . in dismissing his said suit in the Law Court at Bristol, Tennessee, and immediately instituting his said suit in the Corporation Court in Bristol, Virginia, all as aforesaid, was for the purpose of causing him embarrassment, oppressing, annoying, harassing and worrying him with fraudulent, oppressive and vexatious litigation, with a view of forcing him, under duress, to submit to and pay exorbitant and unjust fees, thereby unlawfully using said Corporation Court of Bristol, Virginia, as an instrument or means of

wrongdoing, injustice, oppression and unconscionable conduct, and for the purpose of evading the domiciliary laws or the laws of Tennessee, which would not permit defendant to attach complainant's property or otherwise affix a lien thereon until after judgment, and that by reason of the above said Virginia litigation is fraudulent or oppressive litigation."

As stated in the Petition, both respondent and petitioner were residents of Bristol, Tennessee, and respondent was abundantly solvent in both states. However, as stated further in the petition, respondent's property in Virginia was impounded by a garnishment at the time the Virginia suit was instituted because he was a non-resident of that state. Such impoundment could not have been had in Tennessee where both parties lived (Petition, page 3).

In deciding the case, the Court of Appeals of Tennessee (and this is the decision now sought to be reviewed) concluded its Opinion as follows:

"(b) and (c) We think the conclusion is inescapable that defendant was acting oppressively and inequitably in maintaining his suits against the complainant. We hold the settlement made was open and fair with no element of fraud, accident or mistake. Mr. Stern knew the services he had rendered, the amounts involved and the results obtained. He deliberately agreed to accept $650.00 as being in full payment of all matters to that date. He accepted $100.00 as down payment. Later he accepted two payments of $100.00 each at monthly intervals. He gave assignments for the remainder which, as pointed out, were overpaid $58.60. There was nothing in the settlement to the effect that time was of the essence, that it would be void and the parties restored to their original status if not paid by a certain time. If there was, it is certain that it was waived by the subsequent acceptance of payments and giving of assign-

ments thereon. Mr. Stern does not tender the amounts received by him and his assignee.

"For him to harass and vex his former client, who was aged and ill, with groundless litigation on claims covered by this settlement, the increasing of the amounts claimed, the attachment of property in a foreign jurisdiction, even though in the same city, and the steady increase of the amounts claimed drive us to the conclusion that his conduct was oppressive, inequitable and unconscionable, designed and intended to force the payment of claims which had been embraced in this settlement.

"(d) The Chancellor found, and we concur in his finding, that Mr. Stern was not subsequently employed by Governor Cox after the settlement in question was made. The services so rendered were without the knowledge or consent of Governor Cox but were rendered wholly at the instance of Judge Caldwell, who testified that a joint fee of $500.00 would be acceptable and that he expected to pay Mr. Stern one-half thereof. The employment was by Judge Caldwell to help him and we think, as did the Chancellor, that Mr. Stern must look to him for his portion of the fee charged. Governor Cox did not know these services were rendered and did not in any manner ratify such employment.

"We do not think Governor Cox was indebted to Mr. Stern in any manner whatever and the decree of the Chancellor is affirmed at the cost of the appellant and the surety on his appeal bond" (Appendix, pp. 28-29).

Without attempting a further statement of the subject matter of litigation, in the absence of a record, respondent files as Exhibit "A" hereto a copy of the Opinion of said Court of Appeals, duly certified by the Clerk of that Court, and same is included in the Appendix to this reply.

In this Opinion the Tennessee Appeals Court sets out the questions involved in the case from which it appears

that there is no real or substantial federal question involved; that no such question is presented for the consideration of the Court; that the determination of the case did not require the determination of any federal question; that the State Court properly rested its grounds of decision on non-federal questions; that the alleged federal questions presented by the petitioner are frivolous; and that the record shows, as does the Petition, as respondent earnestly and respectfully insists, that the questions presented are all questions of local law. As said by the Tennessee Court of Appeals:

> "Complainant has appealed and assigned some fifteen errors which we think may be said to present the following propositions:
>
> "1. The Chancery Court was without jurisdiction to enjoin the action brought by Mr. Stern in the courts of Virginia;
>
> "2. The pleadings are not sufficient to present a case for equitable relief;
>
> "3. The evidence is not sufficient to sustain a decree in that:
>
> "(a) The Complainant was estopped by his action in the Virginia suit to seek any relief in this cause;
>
> "(b) The evidence does not show the defendant to have been acting oppressively or in bad faith in bringing his suit in Virginia, but that to the contrary he had a valid cause of action which could be asserted in that or any other forum;
>
> "(c) That the failure of Governor Cox to promptly pay the agreed sum of $650.00 vitiated the entire settlement and authorized suit for the amounts originally claimed;
>
> "(d) And that after the settlement aforesaid, defendant rendered additional services to Governor Cox in the assessment case and was entitled to recover therefor. We shall discuss these propositions in order." (Appendix, pages 26-27.)

II.

RESPONDENT'S OBJECTIONS TO JURISDICTION.

(1) Rule 38 of this Honorable Court requires that a petition for certiorari be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. So far as respondent knows, this was not done.

(2) Rule 38 likewise requires the petition, the record and supporting brief, to be filed with the Clerk within the period prescribed by Section 8 of the Act of February 13, 1925 (28 U. S. C. A., Sec. 350). This was not done, as respondent is informed and verily believes, unless the three-month period from the date the judgment or decree sought to be reviewed was entered (October 8, 1946) has been extended, of which respondent has had no notice.

The petition states that the Tennessee Supreme Court's refusal or denial of petitioner's application to that Court for a writ of certiorari to review the decision of the Tennessee Court of Appeals now sought to be reviewed in this Honorable Court was on the 26th day of October, 1945 (evidently meaning 1946), and became final ten days later. (Petition, page 2.)

As a matter of fact, the Tennessee Supreme Court denied the writ on October 8, 1946, as shown by a certified copy of the decree of that Court which is filed as Exhibit "B" hereto and incorporated in the Appendix hereof (Appendix, pages 13 to 29).

According to petitioner's interpretation of the law, the decision now sought to be reviewed became final ten days after October 8, 1946, or on October 18, 1946, and three months from that date would expire on January 18, 1947, and the Petition (without the record) was not filed until January 22, 1947.

In the absence of a petition for a rehearing being filed with the Tennessee Supreme Court, which under Rule 32 of that Court must be filed within ten days after the Opinion in the case sought to be re-examined is announced, respondent insists that the Opinion now sought to be reviewed became final on October 8, 1946, the date the judgment or decree of the Supreme Court was entered, and the three-month period prescribed by the Act of February 13, 1925, commenced to run on this entry date and expired on January 8, 1947 (Rule 32, 173 Tenn. 886).

(3) Rule 38 of this Court, paragraph 3, likewise requires that notice of the filing of the Petition, together with a copy of the Petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after same are filed with the Clerk, unless the time is enlarged, etc. As shown by the notice, of which respondent's counsel accepted service, a copy of the record has not been furnished.

(4) and (5) Rule 38, paragraph 2, requires that the petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question; the questions presented; and the reasons relied on for the allowance of the writ. In these respects respondent verily believes and earnestly insists that the petition as filed is inadequate.

(6) and (7) No real or substantial federal question is involved or presented for the consideration of the Court. Respondent believes that this insistence is shown by the Petition itself, and also by the Opinion of the Court of Appeals (Appendix, pages 13-29).

It is deemed unnecessary to cite authority that in the absence of a substantial federal question the Court is without jurisdiction.

(8) As shown by the Opinion of the Court of Appeals, the determination of the case by that Court did not require the determination of any federal question.

Williams v. Keiser, 323 U. S. 471, 89 L. ed. 398-403.

(9) The Tennessee Court of Appeals properly rested its grounds of decision on non-federal questions.

Richardson Machine Co. v. Scott, 276 U. S. 128, 72 L. ed. 497.

(10) Respondent verily believes and earnestly insists that the alleged federal questions attempted to be made in the Petition are frivolous.

Petitioner asserts that he was denied due process of law under the Constitution of the State of Tennessee, Section 17, by reason of the Tennessee Supreme Court's refusal or denial of his petition for certiorari (Petition, page 2).

Petitioner also asserts that the decrees complained of flagrantly violated Section 2 of Article IV of the Federal Constitution, in that the Tennessee State Court had no right to enjoin prosecution of his suit in the Virginia Corporation Court, notwithstanding that the Tennessee Courts held, and respondent earnestly insists, that he, the petitioner, was attempting to use the Virginia Court as an instrument of fraud and oppression and to compel respondent to submit to and pay unjust and exorbitant fees which had already been settled (Petition, page 2). Petitioner also asserts that the Tennessee Court violated his constitutional rights in adjudging that respondent did not owe him anything at the same time it adjudged that his Virginia suit, ostensibly instituted to collect fees, was harassing and vexatious and groundless litigation, oppressive and inequitable, and should be perpetually enjoined (Petition, page 13 et seq.).

As a matter of fact the question of whether or not respondent owed petitioner was material on the question of whether or not petitioner's Virginia suit was oppressive, vexatious litigation.

Respondent insists that all of these alleged federal questions are frivolous.

(11) The Petition, certainly the record, discloses that the questions presented are all questions of local law.

Copperwell Steel Co. v. Industrial Commission of Ohio, 324 U. S. 780, 89 L. ed. 1363;
Herb v. Pitcairn, 324 U. S. 117, 89 L. ed. 289.

(12) The Petition does not show merit.

Wherefore, the respondent respectfully prays that the petition for a writ of certiorari be denied.

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APPENDIX.

EXHIBIT "A".

Filed Mar. 16, 1946.

W. H. Eagle, Clerk.

In the Court of Appeals of Tennessee,
Eastern Section.

John I. Cox,
Complainant-Appellee,
vs.
J. L. Stern,
Defendant-Appellant.

From Chancery Court of Bristol, Tenn.
Hon. S. E. Miller,
Chancellor.

For Complainant:

W. D. Lyon,
Blountville, Tenn.,
Cox, Taylor, Epps and Miller,
Johnson City, Tenn.

For Defendant:

Lyle Burrow,
J. S. Ashworth,
Bristol, Tenn.

Opinion.

Hale, J.

The defendant appeals from a decree enjoining him from prosecuting a suit he had instituted against complainant in the Corporation Court of Bristol, Virginia and adjudging that the complainant was not in any manner indebted to the defendant for any of the matters sued for in the Virginia court.

Complainant Cox is about ninety years of age, a former Governor of the state, a resident of Sullivan County, Tennessee, and the owner of valuable property in and around Bristol, Tennessee-Virginia. His property is in both states, the record indicating the value of his Virginia property to be $30,000 to $40,000 and the value of his Tennessee property to be approximately $200,000. The record discloses without dispute that his property in Tennessee was unencumbered and subject to execution for any claim the defendant had against him. The defendant, Stern, is a lawyer living in Sullivan County, Tennessee and practicing in Bristol. He had represented Mr. Cox in certain specific legal matters over a period of several years.

On June 8, 1943 Mr. Stern sent to Mr. Cox a bill for $3,000 for services rendered to that date. Judge Joseph A. Caldwell of Bristol, who is a brother-in-law of Mr. Stern, had been representing Mr. Cox generally and the claim was turned over to him for his recommendation. He discussed it with Mr. Stern and it was agreed that the fees should be $1,000 less a credit of $350, leaving net $650. Cox agreed to pay and Stern agreed to accept this in full settlement up to that date—"fees, expenses or anything else in connection with his representation of Governor Cox" as testified by Judge Caldwell.

On the date of this settlement, June 22, 1943, Mr. Cox issued to Mr. Stern his check for $100 as "first payment of a balance of settlement this day made and when bal. paid in full to cover fees of all kind." Two additional payments of $100 each were subsequently made to Mr. Stern under this agreement, one on August 19th, the other on September 21, 1943. This made a total of $300 paid directly to him and he executed assignments for the remainder. One of these assignments was to his wife for $92 and the other to the East Tennessee Light and Power

Company for about $280, which was subsequently raised to $316.60. Later, as will be hereinafter set forth, these assignments were paid in the suit subsequently brought by Mr. Stern in the Virginia court.

On October 27, 1943, according to Cox's testimony, Stern telephoned him and wanted payment of the remainder due. He was asked if he couldn't wait until the first of the month, but made no reply and hung up the phone. Shortly before this, a representative of the East Tennessee Light and Power Company was undertaking an investigation of the amount due by Cox to Stern. The record is not clear just when these assignments were dated, but at any rate they were paid by Mr. Cox and he was entitled to credit therefor in payment of the settlement he had made with Mr. Stern. These assignments total $408.60 and, as indicated, were paid after the institution of the Virginia suit presently to be referred to. Adding to this the $300 paid directly to Mr. Stern made a total of $708.60 instead of the $650 agreed upon, an overpayment of $58.60. It is not shown why or how this error was made, but it is clear it was an overpayment and went to Mr. Stern's assignees on his order and for his benefit.

On November 13, 1943, Mr. Stern filed suit in the Law Court of Bristol, Tennessee, against Mr. Cox, alleging there was due him in fees the sum of $2,150. This, with the exception of the item presently to be noticed, covered the same items embraced in the settlement made by him and Mr. Cox. Judge Caldwell represented Mr. Cox in this proceeding and filed plea on January 23, 1944, and moved for a continuance, which was had on a doctor's certificate on the illness of Mr. Cox. On January 5th Mr. Stern took a voluntary non-suit and on January 6th he filed an attachment suit in the Corporation Court of Bristol, Virginia, in which he sued for fees in the sum of $5000 including the same items, but larger amounts than

those embraced in the suit brought in Tennessee. Subsequently, a bill of particulars was filed by him in which the amount was raised to approximately $6,000 and subsequently an amended bill of particulars further raised the same items to $8,000.

The suit in the instant cause was filed by Mr. Cox on March 18, 1944, to enjoin the prosecution of the Virginia suit and to obtain an adjudication of all claims the defendant had against complainant. The bill averred:

> "Complainant therefore charges that the defendant, J. L. Stern, began his original litigation against the complainant with the intent to defraud, oppress, annoy, harass and coerce the complainant into paying him exorbitant and unjust fees, which complainant does not owe him and for this purpose undertook to collect items that he claims complainant owes him, which items if they ever did exist are barred by the statute of limitations, which is hereby specifically pleaded and also that all items which complainant ever did owe the defendant have been paid; that the defendant has no legal or just right to start his litigation in the courts of Tennessee where they both reside and dismiss the same and immediately go to another state to litigate him there for the same things. The declaration and bill of particulars in the cases in Tennessee and Virginia show that the same items are listed in the Virginia Suit that were listed in the Tennessee but in different amounts and an additional item or two in the Virginia suit that are not in the Tennessee suit. That the defendant has gone into the courts of Virginia and filed his suit there not with any idea that he could not get justice in Tennessee or that his case would get any better consideration there but with the sole purpose of taking advantage of complainant's condition of health and infirmity of age by bringing a suit to be threshed out, worried over after he had already had one case dismissed in Tennessee. That he simply brought the suit in Virginia as a vex-

atious suit for the purpose of annoying, harassing, coercing complainant into submission rather than be worried with the matters involved and largely because of his physical condition; that these extra troubles and annoyances are preying upon his physical and nervous condition brought about by sickness and age; that the suit brought in Virginia has paralyzed his activities in business and continues to interfere with his activities so that his dwindled strength will be unable to stand up under these annoyances much longer unless the defendant is enjoined and restrained from further prosecuting the suit in Virginia."

On the fiat of Chancellor Miller an injunction was issued enjoining the prosecution of the Virginia suit and "also that the said J. L. Stern be required to present and litigate all matters and claims which he has or may have against John I. Cox in this case, so that this court shall adjudicate and dispose of all claims of the said J. L. Stern against the said John I. Cox and further that the said J. L. Stern be enjoined from bringing other suits or prosecuting other suits against the said John I. Cox." Mr. Stern filed a sworn answer on March 29, 1944. In it he says:

> "He admits that he sent complainant a bill of $3,000.00 for services performed for him up until the time the bill was rendered. He admits that on July 22, 1943, he and complainant reached an agreement for settlement on all matters up until that date. That in this settlement he agreed to accept $750.00 in settlement, $100.00 to be paid at the time and $100.00 each month until fully paid. That he accepted $100.00 at the time of agreement and on subsequent occasions he accepted other payments as alleged. None of the payments were made on time or according to the agreement and to get a payment defendant had to write complainant and hunt him up and make trip

after trip to get what he did. He finally despaired of ever being paid the amount agreed upon and the additional amount that had been earned after the alleged settlement and brought suit in the Law Court at Bristol, Tennessee. At the time the suit was instituted in the Corporation Court of Bristol, Virginia complainant had never yet paid the amount that he admitted that he owed nor had he paid the assignments made and which he accepted. Time was of the essence of the agreement of compromise and complainant wholly failed to comply with his agreements as to payments. He files only the first check given to defendant and if he will file the other checks they will show that complainant did not comply with his contract. Defendant denies that he has at any time ever charged complainant exorbitant or excessive fees. That when he sent the statement for $3,000.00 he knew he was not charging complainant enough but knowing him as he did he thought he would take that amount as a matter of compromise. At the time of the alleged settlement one of the largest suits in which defendant represented complainant had not even been brought. This was the suit of John I. Cox v. City of Bristol, Tennessee, and involved an assessment for taxes. In this suit complainant was successful and his assessment was reduced $17,000.00. This suit was not instituted until about August 16th, 1943, and complainant's attorneys of record in both the suit in the Law Court at Bristol, Tennessee, and in the Corporation Court of the City of Bristol, Virginia, have admitted and will now admit that defendant has not been paid and is due a fee for his services and that the alleged settlement did not cover and could not have covered this suit. Furthermore the largest suits for which defendant claims a fee in the suit attempted to be enjoined was not decided until December, 1943, and defendant did not know what his fee would be, did not sue for it in the suit in the Law Court at Bristol, Tennessee, and it was not included in the alleged settlement."

He denied that he began the litigation with the intent to defraud, oppress, annoy, harass and coerce complainant into paying exorbitant fees. This answer was a general appearance. It did not attempt to challenge by plea the local or general jurisdiction of the Chancery Court, but to the contrary was intended to meet and deny the equities alleged in the bill.

On March 23, 1944, the cause was before Chancellor Miller on Mr. Stern's motion to dissolve the injunction because "the court is without jurisdiction and for lack of equity upon the face of the bill." Action on this motion was continued and defendant was allowed to add an additional ground that the complainant was "estopped by his acts in the suit now pending in the Corporation Court of Bristol, Virginia." This motion was finally disposed of on March 31, 1944, at which time Chancellor Miller held:

> "That the defendant's plea or contention that the complainant is estopped by reason of his acts and conduct in the Virginia litigation, and his delay in filing the bill in this cause, are without merit or substance in the light of defendant's conduct. Complainant was forced into said litigation, and drawn into same against his will, and has only done what was reasonably necessary to prevent a judgment being taken against him. There was no unreasonable delay in bringing this suit and it does not appear that complainant has in any way or at any time acquiesced or countenanced defendant's conduct as hereinbefore set out. In fact, exactly the contrary appears, and the Court is of opinion that the defendant is in no position to insist upon an estoppel.
>
> "And the Court being of opinion that the complainant has abundantly made out a case for the interposition of a Court of equity and that the injunction in this cause should be sustained, it is accordingly so ordered, adjudged and decreed; and defendant's motion to dissolve said injunction is overruled and denied.

"Thereupon, came the defendant and moved the Court for a ruling on whether or not he will be required to present and litigate his claims against the complainant in this cause, and the Court being of opinion that having taken jurisdiction for one purpose, it should take jurisdiction for all purposes, finds and holds, as heretofore ordered, that the defendant be and he is hereby required to present and litigate all matters and claims which he has or may have against the complainant in this Court and cause to the end that the Court may adjudicate and settle all matters between the parties in one suit."

The defendant prayed, but was refused, an appeal to the Court of Appeals. Subsequently, Mr. Stern filed a petition for certiorari and supersedeas with us seeking to reverse the action of the Chancellor in refusing to dissolve the injunction. In that case we said:

"The answer does not allege that any property had fraudulently been removed to Virginia the insistence being that an earlier trial was wanted and could be had there. This is hardly plausible in view of the fact that when the suit was instituted in Sullivan County the plaintiff did not take advantage of the Code Sections authorizing the plaintiff to expedite the hearing by causing a certified copy of the declaration to accompany the summons (Code, Secs. 10333, 10334).

"To the contrary, the bringing of this suit in Tennessee, its dismissal, and the immediate institution of another in Virginia, attaching property of the defendant, coupled with the apparent inclusion of claims covered by the settlement of July 22nd, 1943, and the steady raising of the amounts claimed for (End of page 4) services rendered might well cause the belief that it was a part of a studied and deliberate course of oppression to compel a settlement on terms or for an amount not otherwise obtainable.

"The Chancellor further held the defendant to be required to litigate and present his claims against the complainant in this cause, to the end that all matters

between the parties be settled and determined in one suit.

"The Chancery Court has the power to enjoin actions at law brought by a citizen of the State of the forum against a citizen of the same state in a foreign State.

"American Express Co. v. Fox, 135 Tenn. (8 Thomp.) 489;
Ins. Co. v. Fisher, 5 Tenn. Ct. Appeals (Higgins) 232;
28 Am. Jur., Injunctions, 211, page 395.

"And this may be done by one not a party to litigation where he would ultimately have to pay any judgment so obtained.

"Am. Nat. Bank v. Guard. L. Ins. Co., 172 Tenn. (8 Beeler) 547.

"The weight of these authorities is in no wise shaken by the case of Miles v. ICRR, 315 U. S. 698, 86 L. Ed. 1129, which reversed our Supreme Court in 184 Tenn. (10 Beeler) 676. The majority opinion of the Supreme Court of the United States held F. B. L. A. (Sec. 6), 45 USCA 56, conferred an option as to the venue which could not be interfered with by injunction.

"While ordinarily a Court of Equity will not enjoin an action in another forum without requiring the confession of judgment, there is an element of discretion involved which may arise from any unusual circumstances. The record does not disclose that the attention of the Chancellor was directed to this particular matter. If it was, we believe the alleged padding of claims and the prima facie oppressive conduct of the defendant might be such unusual matters as would justify the exercise of a sound discretion in refusing to compel the complainant to confess judgment in a foreign jurisdiction. Upon a showing of merit the cause would still be under the control of Chancellor so as to allow him to take such steps and compel such

action as might be necessary for the protection of the parties litigant.

"Complaint is made to the action of the Chancellor requiring the defendant to present his claim in this cause. This was not error (Haynes v. Bank, 106 Tenn. [22 Pick.] 425). To ascertain the rights of the parties it will be necessary for the Chancellor to fix and determine the amount due, if any, by complainant to defendant. Indeed, as a condition to granting relief (End of page 5) the Chancellor has sufficient power to require the confession of a judgment, for the amount found due, in the Courts of Virginia, or in this cause, even though the defendant did not file a cross action in the instant cause.

"In short, the complainant presents a prima facie case of merit. The Chancellor had a sound discretion as to whether or not the injunction should be dissolved or modified. His action in denying the motion to dissolve was merely an interlocutory order, not constituting a decision on the merits and was not in excess of his jurisdiction or illegal in any respect whatever. We have the right to issue the writ of certiorari where the officer exercising judicial functions has exceeded his jurisdiction or is acting illegally (Code, Sec. 8989). It was not contemplated that we review interlocutory orders made in the sound discretion of the chancellor during the progress of the cause.

"State v. Hunt, 137 Tenn. (10 Thomp.) 243;
State v. Herbert, 127 Tenn. (10 Cates) 220;
Tenn. C. Ry. Co. v. Campbell, 109 Tenn....;
State v. Alexander, 132 Tenn. (5 Thomp.) 439.

"Petition denied at cost of petitioner and the surety on his bond (End of Page 6)."

Thereupon the petitioner sought a writ of certiorari from the Supreme Court to reverse the action of this court, which latter petition was denied upon jurisdictional

grounds. Upon the refusal to grant certiorari, proof was taken and cause submitted to the late lamented Chancellor S. E. Miller, who, after referring to his action in refusing to dissolve the injunction and the refusal of this court to grant certiorari and supersedeas, said:

"Were there any doubt as to the proper exercise of the discretion lodged in the Court to grant an injunction upon well established grounds for such action, restraining the prosecution of the case by the defendant in the Virginia Court, that doubt is abundantly removed by the proof taken and filed in the case. It is independently established by the testimony of Judge J. A. Caldwell, and admitted by the defendant, that an agreement was reached between the parties for the settlement of all fees due defendant for services up to July 22, 1943 for the sum of $650.00. And it is shown that said sum was paid by three checks filed in the record amounting to $300.00, and the balance by accepting two assignments given by the defendant against the same and later by paying the amounts assigned. The assignments were paid on or about March 1, 1944 as evidenced by an order of that date in the Virginia case, which, however, provided that the payments were made without prejudice to the rights of either party.

"It is claimed by the defendant in this case that complainant breached the agreement for a settlement by failing to make payment within the time agreed upon; and the defendant assigns this as a reason for his repudiation of the entire agreement notwithstanding he had received $300.00 in cash and given assignments for the balance. The complainant is shown to be a man of large means, and abundantly solvent, and very clearly no sufficient reason is assigned justifying the repudiation of the agreement by the defendant.

"It is shown by Judge Caldwell that he alone was employed in the one case in which defendant claims he was employed and rendered service after the settlement of July 22, 1943, and for which he has not

been paid, and that was the tax case of John I. Cox v. City of Bristol. The positive testimony of both Judge Caldwell and complainant overcomes the testimony of defendant to the effect that he was ever employed in that case by the complainant. Complainant had just had trouble with the defendant over fees; the defendant sent complainant a bill for $3000.00 but finally agreed to take $650.00, in addition to certain expenses which had been advanced; it therefore seems very unlikely that complainant would forthwith employ defendant again. Judge Caldwell and defendant had represented complainant in some of the suits and likely on that account he, Judge Caldwell, engaged defendant to look up some records for his use in the trial of the case which required something like two or three days of his time. Judge Caldwell says a fair fee in that case is the sum of $500.00, and because he had engaged defendant to do some work for him in the case he expects to pay him one-half of his fee of $500.00. The defendant says he assisted in the trial of the case; even so, from the total fee of $500.00 which Judge Caldwell expects to charge he is sure of his one-half and that should be the end of the matter so far as that service is concerned.

"Notwithstanding the settlement of July 22, 1943, the defendant instituted suit against the complainant in the Law Court at Bristol on November 13, 1943 for $2800.00, less a credit of $650.00 or for $2150.00. He gives as a reason for the suit and for raising the amounts that he talked to lawyers and concluded he had charged too little for his services and was entitled to more, etc. In the circumstances set out in the pleadings and in the order overruling the motion to dissolve the injunction, the defendant on Jan. 5, 1944 took a non-suit in the Law Court case, and on the next day instituted his suit in the Corporation Court of Bristol, Virginia, not for $2150.00 but for $5000.00. He particularized the services sued for as the same as those in the Law Court case. On subsequent days he further particularized, first setting the amount due him at $6292.00, and later at $8000.00. He gives as a

reason for taking a non-suit, the continuance of the case because of the illness of defendant, and in order that he might get an earlier trial."

In disposing of the question of estoppel, Chancellor Miller said:

"The record shows that complainant first appeared specially in the Virginia Court for the sole purpose of moving to quash the attachment sworn out in the case. The motion was overruled by the Court and the complainant reserved exceptions. Thereafter complainant's attorneys relying on their exceptions appeared in the Virginia Court for the sole purpose, as they testify, of preventing a judgment from going against their client. On this question the Court of Appeals approved the holding of this Court as follows:

" '(11) That the defendant's pleas or contention that the complainant is estopped by reason of his acts and conduct in the Virginia litigation, and his delay in filing the bill in this cause, are without merit or substance in the light of defendant's conduct. Complainant was forced into said litigation, and drawn into same against his will, and has only done what was reasonably necessary to prevent a judgment being taken against him. There was no unreasonable delay in bringing this suit and it does not appear that complainant has in any way or at any time acquiesced or countenanced defendant's conduct as hereinbefore set out. In fact, exactly the contrary appears, and the Court is of the opinion that the defendant is in no position to insist upon an estoppel.' "

"Mr. Donald T. Stant, a Virginia lawyer of ability and high standing, made a special appearance in the Virginia Court for the purpose of quashing the attachment. There was no personal service. Mr. Stant was called as a witness by the defendant, and he indicates by his testimony that such appearances as were made thereafter were the more or less informal, pre-

liminary, procedural steps usual in such cases. He states positively that the pleadings in the Virginia case had not been completed when the instant suit was brought. There was no purpose on the part of complainant's attorneys to waive the question of jurisdiction and that is evidenced by the two orders entered in the case on March 1, 1944, which specially provided that they were made without prejudice to either side. Indeed, after all is said on this subject, the case presented by the record is so unusual and extraordinary that the Court might well be justified in declining to enforce technical rules or principles of law and procedure."

Thereupon a decree was entered judging that Governor Cox was not indebted to Mr. Stern who was enjoined from further proceeding with the suit brought in the corporation of Bristol, Virginia and required to dismiss the same. Complainant has appealed and assigned some fifteen errors which we think may be said to present the following propositions:

1. The Chancery Court was without jurisdiction to enjoin the action brought by Mr. Stern in the courts of Virginia;

2. The pleadings are not sufficient to present a case for equitable relief;

3. The evidence is not sufficient to sustain a decree in that:

(a) The complainant was estopped by his action in the Virginia suit to seek any relief in this cause;

(b) The evidence does not show the defendant to have been acting oppressively or in bad faith in bringing his suit in Virginia, but that to the contrary he had a valid cause of action which could be asserted in that or any other forum;

(c) That the failure of Governor Cox to promptly pay the agreed sum of $650.00 vitiated the entire settlement and authorized suit for the amounts originally claimed;

(d) And that after the settlement aforesaid, defendant rendered additional services to Governor Cox in the assessment case and was entitled to recover therefor. We shall discuss these propositions in order.

We think the first and second propositions are concluded by what we said in the disposal of the petition for certiorari and supersedeas which became the law of this cause on this appeal.

Life and Casualty Insurance Company v. Jett, 175 Tenn. 295, 299, 133 S. W. 2d 997, 998; Rice Brothers Auto Company v. Ely, ... Tenn. Appeals, page ..., 178 S. W. 2d 88.

Notwithstanding this opinion we have, in deference to counsel, re-examined the law applicable and reiterate and adhere to what was said in such former opinion. Likewise we think the pleadings are sufficient and adhere to that holding also. So far as the facts are concerned, we think the Chancellor's statement that the facts strengthen the allegations made in the petition is true and we concur in his findings of fact.

(a) The entry of appearance in the Virginia case was special and designed only to prevent further action. The payments made of the assignments were made with reservation of rights, but if there had been an appearance in that case, we think the increase in the amount claimed under the bill of particulars and its increase by an amendment thereto would have, in and of itself under the peculiar facts of this case, justified the interposition of a court of equity. And in this connection it may be remarked that the defendant in the instant case by his failure to enter a special appearance may have indicated a

waiver of the question he now seeks to make. As pointed out by us and by the Chancellor, his appearance in the instant case was general without the slightest effort to make his entry special or to reserve any rights incident thereto.

(b) and (c) We think the conclusion is inescapable that defendant was acting oppressively and inequitably in maintaining his suits against the complainant. We hold the settlement made was open and fair with no element of fraud, accident or mistake. Mr. Stern knew the services he had rendered, the amounts involved and the results obtained. He deliberately agreed to accept $650.00 as being in full payment of all matters to that date. He accepted $100.00 as down payment. Later he accepted two payments of $100.00 each at monthly intervals. He gave assignments for the remainder which, as pointed out, were overpaid $58.60. There was nothing in the settlement to the effect that time was of the essence, that it would be void and the parties restored to their original status if not paid by a certain time. If there was, it is certain that it was waived by the subsequent acceptance of payments and giving of assignments thereon. Mr. Stern does not tender the amounts received by him and his assignees.

For him to harass and vex his former client, who was aged and ill, with groundless litigation on claims covered by this settlement, the increasing of the amounts claimed, the attachment of property in a foreign jurisdiction, even though in the same city, and the steady increase of the amounts claimed drive us to the conclusion that his conduct was oppressive, inequitable and unconscionable, designed and intended to force the payment of claims which had been embraced in this settlement.

(d) The Chancellor found, and we concur in his finding, that Mr. Stern was not subsequently employed by

Governor Cox after the settlement in question was made. The services so rendered were without the knowledge or consent of Governor Cox, but were rendered wholly at the instance of Judge Caldwell, who testified that a joint fee of $500.00 would be acceptable and that he expected to pay Mr. Stern one-half thereof. The employment was by Judge Caldwell to help him and we think, as did the Chancellor, that Mr. Stern must look to him for his portion of the fee charged. Governor Cox did not know these services were rendered and did not in any manner ratify such employment.

We do not think Governor Cox was indebted to Mr. Stern in any manner whatever and the decree of the Chancellor is affirmed at the cost of the appellant and the surety on his appeal bond.

Hale.

Office of Clerk of Court of Appeals
For the Eastern Division of the State of Tennessee.

I, W. H. Eagle, Clerk of said court, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion of said court, pronounced at its May Term, 1945, in the case of John I. Cox against J. L. Stern as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Court, at office in Knoxville, on this the 1st day of February, 1947.

/s/ W. H. Eagle, Clerk,

By Rose A. Joy, D. C.

(Court Seal)

EXHIBIT "B."

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

September Term, 1946

Tuesday October 8, 1946

Court met pursuant to adjournment present and presiding the Honorable Chief Justice Grafton Green, and the Honorable Associate Justices Alan M. Prewitt, A. B. Neil, Frank H. Gailor, and the Honorable Special Judge Paul Campbell sitting during the disability of the Honorable Alex W. Chambliss.

The minutes of yesterday were read and signed when the following proceedings were had, to-wit:

John I. Cox
vs.
J. L. Stern. } Writ Denied.

This cause came on to be heard on the transcript of the record from the Chancery Court of Sullivan County at Bristol, Tennessee, opinion and decree of the Court of Appeals, petition for certiorari, assignments of error and briefs of counsel; and upon consideration thereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition for writ of certiorari is denied.

The petitioner, J. L. Stern, and sureties Mabel C. Stern and Hattie J. Stern, will pay the costs incident to filing petition for certiorari, for which let execution issue.

Office of Clerk of Supreme Court
For the Eastern Division of the State of Tennessee

I, W. H. Eagle, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the Decree of said Court, pronounced at its Sept. term, 1946, in the case of John I. Cox against J. L. Stern as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 24th day of January, 1947.

S/ W. H. Eagle, Clerk,

By.....D. C.

(Court Seal)